United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S.

75-1412

to be argued by RICHARD R. ROMERO

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN CAPUTO,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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I N D E X

C I T A T I O N S

Cases:

Cases:

Cases:

Cases Cont'd

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ISSUES PRESENTED

I. WHETHER THIS COURT HAS JURISDICTION TO ENTERTAIN THE APPEAL.

II. WHETHER APPELLANT MAY BE RETRIED FOLLOWING A MISTRIAL DECLARED AT HIS REQUEST AFTER THE PROSECUTOR MADE AN IMPROPER AND PREJUDICIAL STATEMENT IN HIS OPENING REMARKS TO THE JURY, WHERE THE TRIAL COURT EXPRESSLY FOUND THAT THE STATEMENT HAD NOT BEEN CALCULATED TO ABORT THE TRIAL.

STATEMENT

1. Appellant's first trial was aborted when the trial court declared a mistrial at his request after the prosecutor made an improper and prejudicial statement in his opening remarks (App. 89-91).[1/] Appellant thereafter filed a motion to dismiss the indictment contending that retrial was barred by double jeopardy principles (App. 103-117). The district court (Bramwell, J.) denied the motion (App. 167-171), and appellant now appeals from the order.

The trial below was stayed upon appellant's notice to the district court that he intended to appeal the denial of his motion to dismiss the indictment. Under this Court's decision in United States v. Beckerman, 516 F.2d 905 (2nd Cir. 1975), appellant may appeal the denial of his motion. We recognize that Beckerman represents the law of this Circuit. However, it continues to be the government's position that an order denying a motion to dismiss an indictment on double jeopardy grounds is not a "final decision" and hence not appealable under 28 U.S.C. 1291, and that the courts of appeals are accordingly without jurisdiction to entertain such appeals.

2. A four count indictment filed October 7, 1974, in the United States District Court for the Eastern District of New York, charged appellant with having made false declarations before a grand jury, in violation of 18 U.S.C. 1623 (App. 5-9). The grand jury was investigating possible violations of 18 U.S.C. 201 (bribery of public officials and witnesses) and other federal statutes. Appellant Caputo appeared before the grand jury under oath on April 29, 1974, and at that time gave the responses alleged in the indictment to have been false.

1/ "App." refers to Appellant's Appendix.

Count I of the indictment charged that appellant made false declarations to the grand jury when he denied telling certain agents of the Federal Bureau of Investigation (FBI) that he had been able to handle the 5th Precinct of the New York City Police Department in regard to gambling matters, and when he denied telling these same FBI agents that he may have paid off employees of the Police Department in matters pertaining to the operation of a parking lot in New York City. (App. 6) In Count II appellant was charged with having made a false declaration when he denied telling another FBI agent on March 3, 1973, that he had paid police officers when he was involved in the gambling business (App. 6-7). Count III charged a false declaration when appellant denied having asked Joseph Schiaffino to telephone Sergeant Gene Statile, a New York City police officer, in April of 1971, (App. 7-8). Count IV charged appellant with having made a false declaration when he denied speaking with Schiaffino, during the Summer of 1973, about Schiaffino's testimony before the grand jury (App. 8-9).

At appellant's arraignment on October 11, 1974, he pleaded not guilty, and the government announced then and on October 25, 1974, that it was ready for trial (App. 1, 152). But after setting trial for January 6, 1975, the district court granted the first of a series of postponements requested by appellant and the government. On February 20, 1975, the court issued an order granting immunity to Joseph Schiaffino, a prospective government witness. (App. 1-2, 22-40). That same day, Schiaffino, who had been avoiding service of a subpoena to appear as a government witness, surrendered to FBI agents

who had been issued a warrant for Schiaffino's arrest as a material witness (App. 16-21). Schiaffino was released on his own recognizance and on February 24, 1975, Schiaffino and his attorney, Dennis Peterson, appeared before the court below. Peterson agreed to have Schiaffino available to testify on two hours' notice by telephone from the government, and Schiaffino personally assured the court that he would be available (App. 24-26).

Trial began on November 3, 1975, with the selection and swearing of a jury. No other proceedings took place on the first day of trial, and the trial was adjourned until November 5, (App. 3). The government advised Peterson on November 3, that Schiaffino should be available to testify at appellant's trial on November 5.[2/] On the evening of November 4, Peterson telephoned Schiaffino's residence, spoke with Schiaffino's son and left the message that Schiaffino was to appear at appellant's trial the following morning. (App. 38).[3/]

On the morning of November 5, Peterson received a telephone message that Schiaffino had gone hunting (App. 38-39). When Schiaffino failed to appear for trial on November 5,[4/] the government requested a continuance in order to locate Schiaffino, but the court replied that the government should

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2/ The government initially advised Schiaffino to be at appellant's trial on November 3, but the government later indicated that his presence was not required on that date (App. 38).

3/ Peterson did not attempt to contact Schiaffino until the evening before trial, November 4, because he expected the trial to be postponed (App. 42).

4/ After Schiaffino failed to appear, his counsel advised the court below as follows (App. 42):

> Mr. Schiaffino has always been available except for this time, Judge
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> I am certain his nonavailability was not intentional and just invertent [sic].

present its evidence on the first two counts of the indictment and that if Schiaffino were still unavialable when his testimony was required, the government should then "make whatever application is necessary under the circumstances (App. 35-37). The following day, November 6, the government advised the court that Schiaffino had not been located (App. 51). The court replied, "We are going to proceed and we will get to that when you want to get to it. That is up to you. Bring in the jury "(Ibid).

In the course of his opening statement to the jury, government counsel began to read Count I of the indictment (App. 58). Appellant's counsel objected on the grounds that appellant would be prejudiced by the reading of Counts III and IV because, with the unavailability of Schiaffino, the government would be unable to prove these counts (App. 59-60).[5/] The court, which had read the indictment to the entire jury panel, concluded that reading the indictment during the government's opening statement might be prejudicial and inflammatory and ruled that the government could summarize but not read the indictment (App. 60-62).

The prosecutor subsequently stated that the evidence would show that Schiaffino, at appellant's request, telephoned a certain police sergeant and that about two weeks later a gambling charge against appellant, which arose in this police sergeant's precinct, was dismissed "because it was a very very

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5/ Before the government's opening statement, appellant's counsel requested that the government be prohibited from "mentioning" Counts III and IV unless the government could show that Schiaffino would testify as he had before the grand jury. The court denied this request (Add. 1-7).

"Add." refers to the Addendum to this brief.

weak case * * *" (App. 67). Appellant's counsel objected and the court instructed the jury that they were not to draw any inference from the dismissed gambling charge (App. 82-83).

The prosecutor subsequently stated in his opening remarks that on March 3, 1973, appellant was interviewed by an FBI agent and that in the course of this interview appellant "was asked to take a lie detector test and he refused" (App. 84). Appellant's counsel immediately approached the bench and moved for a mistrial, which the district court granted (App. 84, 91).

Once the jury was dismissed, the court asked if counsel were ready to pick another jury. Both the government and defense counsel stated that they were ready; however, another jury was not selected that day because no other jurors were then available (App. 92-94).

Appellant thereafter filed a motion to dismiss the indictment alleging that retrial was barred by the Double Jeopardy Clause because the government had intentionally provoked a mistrial to gain time to locate the witness Schiaffino (App. 103-117). The government attorney, whose statement provoked the mistrial, submitted an affidavit stating that he "had no intention whatsoever to abort the trial" (App. 149). The court below, after hearing oral argument and the submission of briefs, denied the motion, stating (App. 140)[6/]:

> From watching the Government, and the Court's viewpoint as an observer, it does't appear to me that you deliberately did this. I think you had good intentions but that wasn't the way it came out. I think you were completely wrong in what you did. There is no question in my mind. I do not think that you did it deliberately. I do not think there was anything deliberate on the Government's part under the circumstances as they were before the Court.

6/ This hearing was held on Monday, November 10, and Mr. Schiaffino was present in the courtroom during these proceedings (App. 128).

Thereafter in a Memorandum and Order issued November 24, 1975, the court denied the motion, ruling as follows (App. 170):

> As this Court declared a mistrial upon the explicit motion of defendant's counsel, the Double Jeopardy Clause does not bar the government from retrying the defendant. United States v. Jorn, 400 U.S. 470, 485, 91 S. Ct. 547, 557, 27 L. Ed. 2d 543 (1971); United States v. Tateo, 377 U.S. 463, 467-468, 84 S. Ct. 1587, 1590, 12 L.Ed. 2d 448 (1964); United States v. Goldstein, 479 F.2d 1061, 1066 (2nd Cir. 1973) cert. denied, 414 U.S. 873, 94 S.Ct. 151, 38 L.Ed. 2d 113. This was not a case of "prosecutorial improperiety designed to avoid an acquittal". United States v. Jorn, supra. 400 U.S. at 485 n.12, 91 S.CT. at 557. Although the prejudical remarks in the prosecutor's opening statement demonstrated considerable ineptitude, this Court does not find them to be the product of a purposeful scheme designed to compel a continuance. The prosecutor has demonstrated nothing less than good faith throughout the proceedings in this case. Indeed, he was willing to select another jury immediately after the mistrial was declared. Since this Court did not declare the mistrial sua sponte, it finds no need to discuss defendant's contentions regarding the "manifest necessity" doctrine. See Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed. 2d 901 (1961); United States v. Jorn, supra; Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425 (1973); United States v. Gentile, _F.2d __, slip op. 239 (2d Cir. October 22, 1975).

This appeal followed.

ARGUMENT

I

THE DISTRICT COURT'S DENIAL OF APPELLANT'S MOTION TO DISMISS THE INDICTMENT IS NOT A FINAL DECISION AND IS HENCE NOT APPEALABLE UNDER 28 U.S.C. 1291. THIS COURT IS ACCORDINGLY WITHOUT JURISDICTION TO ENTERTAIN THIS APPEAL

We are of course aware that this Court has considered the government's position on this question and has rejected it. United States v. Beckerman, 516 F.2d 905 (2nd Cir. 1975). However, since it continues to be our belief that the courts of appeals are without jurisdiction to entertain an appeal from an interlocutory order denying a motion to dismiss an indictment on the ground that prosecution is barred by double jeopardy principles, we reiterate our arguments here.

The government is mindful that the trial of an accused in contravention of double jeopardy principles subjects the accused to the expense and ordeal of a trial and thereby implicates the full protection of the Double Jeopardy Clause. We do not, however, believe that the rights of the accused under the Double Jeopardy Clause "will [thereby] have been lost, probably irreparably" [Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949)]. United States v. Beckerman, supra, 516 F.2d at 906-907. Nor do we believe, as this Court's reliance in Beckerman [Id. at 906] on United States v. Landsdown, 460

F.2d 164, 171 (4th Cir. 1972) suggests, that the question whether an appeal from an interlocutory order may be had is dependent upon whether the "full protection" of a particular constitutional provision would otherwise be lost. With respect to a variety of rulings by district courts erroneously rejecting valid constitutional claims, persuasive arguments can be made that the "full protection" of the constitutional provision invoked is abridged. Yet, it has never been suggested that a court's rejection of a defendant's claim based upon the Constitution for that reason falls within the "small class" of interlocutory orders which may be appealed under 28 U.S.C. 1291. Cohen v. Beneficial Loan Corp., supra. To the contrary, the loss suffered must be virtually irreparable. Thus, while we do not derogate the high purposes served by the Double Jeopardy Clause, we at the same time believe that it rests on a plane with the other provisions of the Constitution and in particular those provisions designed to protect the criminally accused. Accordingly, we submit that the compelling considerations which countenance against piecemeal review of criminal cases in most every other circumstance apply equally forcefully with regard to orders denying motions to dismiss on double jeopardy grounds.

The compelling considerations which underlie the avoidance of piecemeal review in criminal cases stem primarily from the recognition that delay inhibits the prompt and fair

resolution of a criminal action. As Di Bella v. United States, 369 U.S. 121, 124, 126 (1962), the Court observed in this regard:

> The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of nisi prius proceedings await their termination by final judgment. First Judiciary Act, §§21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789); see McLish v. Roff, 141 U.S. 661. This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases. See Cobbledick v. United States, 309 U.S. 323, 324-326.
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> * * * * *
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> Despite these [previously discussed] statutory exceptions to, and judicial construction of the requirement of finalty, "the final judgment rule is the dominant rule in federal appellate practice." 6 Moore, Federal Practice (2d ed. 1953), 113. Particularly is this true of criminal prosecutions. See, e.g., Parr v. United States, 351 U.S. 513, 518-521. Every statutory exception is addressed either in terms or by necessary operation solely to civil actions. Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law. The Sixth Amendment guarantees a speedy trial. Rule 2 of the Federal Rules of Criminal Procedure counsels construction of the Rules "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay"; Rules 39(d) and 50 assign preferance to criminal cases on both trial and appellate dockets.

Accordingly, since "encouragement of delay is fatal to the vindication of the criminal law[,]...[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." Cobbledick v. United States, 309 U.S. 323, 325-326 (1940). See also, Parr v. United States, 351 U.S. 513, 519-520 (1956). In this regard, it is important to note, as the Fifth Circuit has pointed out, that "[t]he Constitution does not guarantee an appeal. That comes wholly from the statute." Gilmore v. United States, 264 F.2d 44, 46 (1959), cert. den., 359 U.S. 994 (1959); United States v. Bailey, 512 F.2d 833, 835 (1975). Thus, there is provision for appeal from an order denying a double jeopardy claim only if such an order can properly be designated a "final decision" within the legislative intendment.

The Supreme Court, in enunciating the limitations on its own appellate jurisdiction, has twice indicated that denial of a double jeopardy claim is not "final" for purposes of appealability. In Rankin v. The State, 78 U.S. 380 (1870), an army officer was indicted in a state court for murder. He pleaded in bar to the indictment that he had been tried and acquitted before a general court martial for the identical crime, and after an evidentiary hearing on the merits his plea was sustained. On appeal, the state supreme court reversed and remanded the

case for trial. The officer then brought a writ of error to the Supreme Court under §25 of the Judiciary Act of 1789, 1 Stat. 85, which authorized appeals in certain specified cases from a "final judgment or decree" of the highest court of a state. The Supreme Court dismissed the writ on the ground that the judgment of the state supreme court "was not a final one in the case" (78 U.S. at 381), since it merely denied a plea in bar and still required a plea to and trial of the merits of the indictment itself. Id. at 382. "The case must go back and be tried upon its merits, and final judgment rendered before this court can take jurisdiction," the Supreme Court held. "If after that it should be brought here for review, we can then examine the defendant's plea and decide upon its sufficiency." Ibid.

In Heike v. United States, 217 U.S. 423 (1910), the defendant filed a comparable plea in bar--a claim that he had statutory immunity from prosecution because he had been required to give grand jury testimony on the subject matter of the indictment. His plea was denied after an evidentiary hearing and he brought a writ of error to the Supreme Court under §5 of the Act of March 3, 1891, c. 517, 26 Stat. 827. While that section in terms authorized appeals "[i]n any case that involves the construction or application of the Constitution of the United States," the Court held that Congress nevertheless intended to restrict appeals to cases in which there had been a "final

judgment." 217 at 428. Then, analogizing the defendant's plea of immunity to a plea of former jeopardy, it reiterated its Rankin holding that the overruling of the latter plea is not an appealable final judgment and on that basis concluded that the immunity statute similarly did not convey a right to pretrial review when an immunity plea is overruled. Id. at 432-433.

The holding in Heike forcefully illustrates our contention that with respect to many constitutional claims, the unavailability of immediate review of a rejection of such a claim will have the effect of depriving an accused of the "full protection" of the constitutional provision invoked.[7/] The rejection of a defendant's valid Fifth Amendment claim in this regard will have the effect of compelling the accused to be a witness against himself, since a valid immunity statute must be coterminous with the Fifth Amendment privilege. Thus, even though a trial court's rejection of a valid Fifth Amendment claim may deprive an accused of the "full protection" of the privilege, the Supreme Court has held that the provision of the immunity statute that no person "shall be prosecuted" for any transaction concerning which he

7/ We note that the Fourth Circuit recently extended its holding in United States v. Landsdown, 460 F.2d 164, 170-172 (1972) to an order denying dismissal of an indictment on grounds of an asserted violation of the Sixth Amendment right to a speedy trial. United States v. MacDonald, Nos. 75-1870 and 75-1871, decided January 23, 1976.

has been compelled to testify "has not changed the Federal System of appellate procedure" so as to "give a right of review upon any other than final judgments." 217 U.S. at 431.[8/]

This Court has of course held that the denial of a motion to dismiss on grounds of double jeopardy is an appealable "collateral order" within the meaning of Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949). United States v. Beckerman, supra. Nevertheless we submit that there is nothing in the "collateral order" doctrine of Cohen which weakens the authority or calls into question the continuing vitality of Rankin and Heike. An order is "collateral" within the Cohen meaning if it does "not make any step toward final disposition of the merits of the case and will not be merged in final judgment" but instead falls "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

8/ Another telling case in point would involve obscenity prosecutions. The denial of a motion to dismiss on the ground that the subject materials are protected by the First Amendment is not subject to immediate appellate review, and yet if the claim is a valid one, a defendant is put to the expense and ordeal of trial for exercising his First Amendment rights and the exercise of those rights may well be inhibited by indictment and prosecution. In such circumstances, one can pursuasively urge that an accused is thereby deprived of the "full protection" of the First Amendment.

Unlike orders setting bail [Stack v. Boyle, 342 U.S. 1, 6 (1951)] or deciding whether a civil plaintiff must post a security bond [Cohen v. Beneficial Industrial Loan Corp., supra], which are concerned with preliminary administrative matters having no effect upon the outcome of the main cause of action, the rejection of a double jeopardy claim is a "step toward final disposition on the merits of the case" and will be merged in final judgment." As explained in Heike [217 U.S. at 429], "[t]he thing litigated" in a criminal case "is the right to convict the accused of the crime charged in the indictment." Moreover, as Mr. Justice Jackson, joined by Mr. Justice Frankfurter in a separate opinion, pointed out in Stack (342 U.S. at 12), the issues raised by an order setting bail can be reviewed "without halting the main trial." While--as this case demonstrates--an order rejecting a double jeopardy claim cannot. In disposing of a plea that trial on the indictment is barred by the double jeopardy prohibition, the trial court thus makes a "step toward final disposition" of the case in the same manner as when it disposes of a plea that trial is barred because the indictment does not charge an offense or because the conduct alleged is constitutionally protected. If the court sustains the plea, its order becomes the final judgment; if it overrules the claim, its order will be "merged in final judgment" and can be reviewed on appeal from the judgment.

Nor does one whose double jeopardy claim is rejected prior to trial suffer an "irreparable loss" as a result. While it is true that the "full protection" of the Double Jeopardy Clause is implicated when an accused is compelled to stand trial despite the existence of a valid double jeopardy claim, this is insufficient to render the matter collateral and appealable. Indeed, such a situation is also presented by the denial of a mistrial motion sufficiently erroneous to require reversal on appeal. And yet it has never been suggested that a defendant can obtain immediate review of such an erroneous ruling or that his retrial following reversal of the conviction is barred by double jeopardy principles. Protection from a second trial is but one aspect of the Double Jeopardy Clause. It also "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969); see also, United States v. Wilson, 420 U.S. 332, 343 (1975). And, as the Supreme Court observed in Ex parte Lange, 85 U.S. 163, 173 (1874), "the real danger guarded against by the Constitution" is "[m]anifestly *** not the danger or jeopardy of being a second time found guilty," but rather "the punishment that would legally follow the second conviction." Thus, while a second trial in contravention of double jeopardy principles implicates the "full protection" of that constitutional provision, it does not create an "irreparable loss," because the ultimate danger--

a viable conviction and consequent punishment--may still be averted. As the Court in Heike observed with regard to the immunity statute, but in language applicable to the Double Jeopardy Clause as well as the privilege against self-incrimination, it provides "a shield against successful prosecution" [217 U.S. at 431]. The ordeal of a second trial with its consequent partial implication of double jeopardy principles, does not therefore constitute a loss sufficient to compel immediate review. It is simply incorrect to urge that the rights under the Double Jeopardy Clause of an accused who is compelled to stand trial "will have been lost, probably irreparably" after final judgment is entered. Cohen v. Beneficial Loan Corp., supra, 337 U.S. at 546. A partial infringement of a right is not an irreparable loss for the purpose of creating appellate jurisdiction. Only "where denial of immediate review would render impossible any review whatsoever of an individual's claims" is the loss deemed irreparable and thus sufficient to warrant immediate and collateral review. United States v. Ryan, 402 U.S. 530, 533 (1971).

The availability of piecemeal review will only serve in most instances as another dilatory tactic which merely postpones the inevitable. In those few cases where a substantial double jeopardy claim is presented, the accused enjoys considerable protection without immediate recourse to appellate review.

This not a situation where the accused has no forum in which to litigate his claim. He is entitled to, and may be expected to receive, the full and careful consideration of the district court. There is certainly no reason to suppose that trial courts will be insensitive to valid claims on double jeopardy grounds. Moreover, since the government now enjoys the right of appeal from an order dismissing an indictment [18 U.S.C. 3731], trial courts have no reason to resolve close questions in the government's favor so as to avoid depriving the government of its right to prosecute in a particular case. Indeed, it would seem likely that a contrary impetus--based upon the desire to avoid subjecting an accused unnecessarily to the ordeal of a second trial--would obtain. Thus, there is no barrier to a full and fair consideration of double jeopardy claims at the district court level, and it may reasonably be expected that litigation at this level will serve to vindicate most valid double jeopardy claims.[9/]

9/ Moreover, it may be that mandamus would be an appropriate remedy in those extraordinary situations where a district court denies a motion to dismiss even though the accused's double jeopardy claim is virtually uncontrovertible. In such cases, where the district court clearly exceeds its powers by placing the defendant in jeopardy, resort to the extraordinary remedy of a writ of mandamus might be appropriate. See United States v. Weinstein, 511 F.2d 622, 626-627 (2nd Cir. 1975), cert. den., 422 U.S. 1042 and cases cited therein.

For these reasons, we believe there exists no compelling reason here to depart from the settled rule of federal appellate practice countenancing against piecemeal review in criminal cases and accordingly submit that this Court is without jurisdiction to entertain this appeal. 28 U.S.C. 1291.

II

IN THE ABSENCE OF PROSECUTORIAL OR JUDICIAL OVERREACHING, THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR RETRIAL OF A DEFENDANT WHO HAS MOVED FOR AND BEEN GRANTED A MISTRIAL

1. The Fifth Amendment provides in part that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb * * *". But the fact that a person has once been placed in jeopardy does not mean that reprosecution is barred under all circumstances. If a defendant succeeds in having his conviction overturned on direct appeal or as result of a collateral challenge, he does not enjoy any protection against reprosection. United States v. Jorn, 400 U.S. 470, 484 (1971); United States v. Tateo, 377 U.S. 463 (1964); Forman v. United States, 361 U.S. 416 (1960); Bryan v. United States, 338 U.S. 552 (1950); Stroud v. United States, 251 U.S. 15 (1919); United States v. Ball, 163 U.S. 662 (1896). The principal reasons for holding that the Double Jeopardy Clause does not bar reprosecution in these circumstances has been explained as follows (United States v. Tateo, supra, 377 U.S. at 466):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. * * *

In cases such as the instant one, in which a criminal trial has been terminated prior to verdict, similar considerations have been invoked in determining the permissability of retrial. See United States v. Goldstein, 479 F.2d 1061, 1066 (2nd Cir. 1973), cert. denied 414 U.S. 873. In United States v. Jorn, supra, 400 U.S. at 485, Mr. Justice Harlan stated in his plurality opinion:

> [W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily (CONT'D)

assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutional or judicial error.10/

This result proceeds logically, indeed inescapably, from the rule permitting retrial following reversal of a defendant's conviction either on direct appeal or in a collateral proceeding. The interest of both the individual defendant and society are well served by a procedural device -- the mistrial -- that provides an incentive to indentify prejudicial error as soon as possible and a means for dealing with that error short of requiring the defendant to proceed to verdict in the face of perceived prejudice (see United States v. Tateo, supra, 377 U.S. at 468, n.4).

10/ None of the opinions in Jorn expressed disagreement with this fundamental proposition, which has also been stated in many court of appeals' decisions. See, e.g., United States v. Goldstein, 479 F.2d 1066 (2nd Cir. 1973), cert. denied 414 U.S. 873; United States v. Pappas, 445 F.2d 1194, 1200 (3rd Cir. 1971), cert. denied sub. nom. Mischlich v. United States, 404 U.S. 984; Gregory v. United States, 410 F.2d 1016, 1018 (D.C. Cir. 1969), cert. denied 396 U.S. 865; United States v. Burrell, 324 F.2d 115, 119 (7th Cir. 1963), cert. denied 376 U.S. 937.

In countless cases, trial courts have exercised their discretion to declare a mistrial on defense motion made in response to errors committed by the court or prosecutor. In each of those cases, the defendant's request for the declaration of a mistrial could be said to have been compelled in the sense that in making the request the defendant reasonably believed, that the error had gravely prejudiced his defense. However, the mere fact that the mistrial is occasional by prosecutoral or judicial error does not bar retrial. For example, in Roberts v. United States, 477 F.2d 544 (8th Cir. 1973), the defense motion for a mistrial was made and granted after the court had inadvertently and erroneously made certain comments that could have been interpreted by the jury as criticism of the trial tactics of an attorney for two of the defendants. In United States v. Kwitek, 467 F.2d 1222 (7th Cir. 1972), cert. denied 409 U.S. 1079, the defendant's motion for a mistrial was granted after it had become apparent that a summary of the defendant's prior record had been inadvertently sent into the jury room and the jury had looked at it. A mistrial was declared on defense CONT'D

If retrial were barred after declaration of a mistrial on motion of the defendant but permitted following the defendant's successful appeal, trial courts could be expected to reject such motions in the vast majority of cases. While any verdict of conviction rendered in such a case would be vulnerable to reversal if an appeal were taken, soceity would at least avoid paying the high price of granting "every accused * * * immunity from punishment because of any defect sufficient to constitute reversible error * * *" (United States v. Tateo, supra, 377 U.S. at 466). But such a rule would itself involve substantial and unnecessary costs, both to the criminal defendant and to society. The defendant would be forced to proceed to verdict in the face of grave and immediate prejudice and to resort to an appeal in the event of conviction in an effort to cure the error of the court or prosecutor. He would then be subject to retrial, many months after his original conviction. Society, on the other hand, would be forced to devote its resources to a proceeding little short of a charade in an effort ultimately to secure a just verdict. See Illinois v. Somerville, 410 U.S. 458, 469 (1973).

Indeed, appellant's contention appears to be foreclosed by the Supreme Court's decision in United States v. Tateo, supra. There, the defendant's

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10/ CONT'D motion in United States ex rel. Montgomery v. Brierley, 414 F.2d 552 (3rd Cir. 1969), because of the court's conclusion that the defendant had been prejudiced by certain references made by the prosecutor in his closing statements. In United States v. Henderson, 439 F.2d 531 (D.C. Cir. 1970), a mistrial was declared on defense motion after the prosecutor announced in the jury's presence that he planned to call the defendant's mother as a rebuttal witness and then failed to do so. In all of the cases discussed above, reprosecution was held not to be barred by the Double Jeopardy Clause.

guilty plea, entered after trial had begun, was subsequently found to have been coerced by certain statements made to his attorney by the trial judge.[11/] Prior to the beginning of his second trial, the defendant sought to have the charges against him dismissed on the ground that reprosecution would offend the Double Jeopardy Clause. Although Tateo's first trial had been terminated short of verdict as a result of actual and improper coercion, the Court rejected his contention, stating that if the defendant "had requested a mistrial on the basis of the judge's comments, there would be no doubt that if he been successful, the Government would not have been barred from retrying him" (377 U.S. at 467; original emphasis). This observation would appear to be directly applicable to the instant case.

Moreover, as already noted, it is well settled that reprosecution of appellant would have been permitted had the trial court denied his motion for a mistrial and had his subsequent conviction been reversed on appeal. No identifiable policy is served by a holding that reprosecution is precluded because appellant's first trial ended with the declaration of a mistrial rather than with a reversible or collaterally vulnerable conviction. As the Court noted in Tateo (377 U.S. at 467):

11/ The trial judge had informed Tateo's attorney on the fourth day of trial that if the jury found Tateo guilty he would impose a life sentence on one of the pending charges and consecutive sentence on the remaining charges. Upon being told of the judge's statement by his attorney and advised that the likelihood of his conviction was great. Tateo changed his plea of not guilty to guilty. In a subsequent Section 2255 proceeding, Tateo's conviction was set aside and he was allowed to withdraw his plea because of the court's finding that the plea had been coerced.

> A defendant is no less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all; the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial.

It is also true, of course, that the termination of a trial prior to verdict is not a step to be lightly undertaken. The Double Jeopardy Clause affords every criminal defendant a "valued right to have his trial completed by a particular tribunal" (Wade v. Hunter, 336 U.S. 784, 689, (1949)); the corollary of this right is a duty on the part of the court and the prosecution to refrain from intentionally bringing about a mistrial -- or, put another way, from depriving the defendant " of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal" (United States v. Jorn, supra, 400 U.S. at 484). Thus, it has been said that reprosecution of a defendant after the declaration of a mistrial, even on the defendant's motion, is not permitted if the mistrial has been brought about "by judicial or prosecutorial impropriety designed to avoid an acquittal * * *" (Idib at 485, n. 12). On the other hand, if the court declares a mistrial sua sponte, and over the defendant's objection, reprosecution is not permitted unless the court's decision to abort the proceedings was justified by "manifest necessity" or the "ends of public justice." Illinois v. Somerville, supra, 410 U.S. at 469; see also United States v. Jorn, supra, 400 U.S. at 485 and United States v. Perez, 22 U.S. 579 (1824).

The differences in the standards applied in measuring the propriety of prosecution after declaration of a mistrial by the court sua sponte and after declaration of a mistrial on motion of the defendant or with the defendant's consent stem from the crucial fact that in the one case it is

the defendant who has exercised an option not to submit his case to the jury then impaneled, whereas in the other that option has been taken from him by the court (see United States v. Jorn, supra, 400 U.S. at 484).[12/]

Thus, if the defendant has been given an opportunity to object to the declaration of a mistrial but has chosen not to do so, or if, as here, the defendant has himself requested a mistrial, he thereby necessarily indicates that his interest in securing what may be a conclusive determination in his favor from the jury then impaneled is outweighed by counterveiling interests. By its very nature, the ultimate decision made by the defendant in this regard is inevitably the product of competing considerations over which the defendant cannot have complete control. But unless the decision has been foreordained by conscieus wrongdoing on the part of the court or prosecutor, designed to avoid an acquittal by the jury then impaneled, "the public's interest in fair trials designed to end in just judgments" (Illinois v. Somerville, supra, 410 U.S. at 470, quoting from Wade v. Hunter, supra, 336 U.S. at 688-689) requires the defendant to make that decision and permits retrial in the event he seeks or acquiesces in a pre-verdict termination of his trial.

12/ Appellant thus mistakenly assets that the court below should have granted a mistrial only if there was a manifest necessity to discontinue the trial (Brief 28-31). But as the court below recognized (App. 170), the stricter test of manifest necessity applies only when the court, sua sponte, declares a mistrial over the defendant's objection. See Illinois v. Somerville, 410 U.S. 458, 469 (1973); see also United States v. Perez, 22 U.S. 579 (1824).

An application of these settled principles to the instant case establishes, we submit, that appellant's retrial is not barred by the Double Jeopardy Clause. Since the result of lie detector tests are not admissable at trial, there is no doubt that it was error for the government to comment on appellant's refusal to take such a test. United States v. Bando, 244 F.2d 833, 841 (2nd Cir. 1975). Appellant's trial counsel argued that the jury might well draw the inference that appellant had refused to take a lie detector test because he was guilty and urged that the prejudice was so substantial that "[t]here [was] just no way of curing it" (App. 91).[13/] The trial court, with good reason, agreed. Accordingly,

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13/ Appellant's contention that the mistrial was occasioned by "three egregious errors in the prosecutor's opening" (Br. at 24) is mistaken. A reading of the record clearly shows that the sole basis for the court's declaration of a mistrial was the prosecutor's reference to appellant's refusal to take a polygraph examination (App. 85-92).

In any event, we do not regard the other two statements as improper. Contrary to appellant's assertion (Brief 6-8), the government did not act improperly in beginning to read the indictment. At that time, the trial court had not yet instructed the government not to read the indictment. The indictment had already been read to the jury by the court, and the government was permitted to summarize the indictment. We also perceive no impropriety in the prosecution having apprised the jury that the evidence presented on Count III would show that Schiaffino had contacted a police lieutenant in regard to a gambling charge against appellant arising in the officer's precinct at appellant's behest and that the gambling charge had subsequently been dismissed. The grand jury was investigating possible bribery of public officials and the materiality of appellant's allegedly false denial in this regard made the full circumstances of this transaction relevant. The fate of the gambling charge and all other circumstances were also probative on the question of petitioners motive to lie.

appellant's mistrial motion "remov[ed] any barrier to reprosecution" even though the motion was "necessitated by prosecutorial error" United States v. Jorn, supra, 400 U.S. at 485.[14]

2. The primary thrust of appellant's contention is predicated upon the factual conclusion that the prosecutor deliberately made the improper statement in order to abort the trial. Since the trial court expressly found that the statement was not calculated to this end, appellant is seeking to have the trial court's determination set aside as clearly erroneous. Since the record supports the factual finding of the court below that government counsel had no intent to provoke a mistrial to gain time to locate the witness Schiaffino, the trial court's finding must be sustained.[15]

14/ A related question is presently pending before the Supreme Court in United States v. Dinitz, No. 74-928, certiorari granted March 31, 1975. It is respondent's contention in that case that this retrial is barred by the Double Jeopardy Clause because his successful motion for a mistrial was in affect "involuntary" because egregious judicial error left him no choice but to seek a mistrial and that he was accordingly unjustifiably deprived of his right to proceed to verdict under the particular tribunal already selected.

15/ Appellant argues that he was entitled to a hearing on the issue of the government's alleged intentional provoking of a mistrial (Brief 24). The simple answer is that he received such a hearing on November 10, 1975. Appellant and the government presented oral argument to the court below and submitted supporting affidavits and briefs (App. 103-147). Appellant indicated no dissatisfaction with the nature of these proceedings. Appellant had not requested that government counsel be required to take the witness stand and tender himself to cross-examination.

The government attorney whose comments provoked the mistrial, stated in an affidavit to the court below that he "had no intention whatsoever to abort the trial" (App. 149). There was, moreover, no reason for the government to cause a mistrial to gain time to locate Schiaffino because there was no reason to believe that the trial court would not grant a continuance if Schiaffino were unavailable when his testimony on Courts III and IV was required. Appellant asserts that the court had indicated that it would not grant a continuance, but he fails to cite any protion of the record in support of this claim and our review of the record does not reveal any such indication. To the contrary, the record reveals simply that the trial court regarded the government's request for a continuance as premature. When Schiaffino failed to appear on November 5, the court indicated that it would not grant a continuance that day, but the court also indicated that the government should seek a continuance when one was needed; that is, when Schiaffino's testimony was required if he were still unavailable (App. 35-37). Since Schiaffino's attorney had indicated on November 5, 1975, (the day before the mistrial) that Schiaffino's absence was not intentional, there was no reason to believe that he was hiding from the government (App. 42). The government could reasonably believe that he would soon be available.

The government's good faith and intention to proceed with appellant's trial on November 6, is shown by its readiness in having at the courthouse five witnesses who would testify in support the of the first two counts of the

indictment (App. 149),[16] and by the government's willingness to pick another

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16/ Appellant, in his motion to dismiss the indictment (App. 106-107) and in in his brief on appeal (Brief 17-24), argues that it was obvious that the government intentionally sought to abort the trial. However, appellant's trial counsel did not suggest in his argument in support of the mistrial motion that the government had such an intent (App. 84-94).

Appellant also asserts that reprosecution is barred because the government's conduct amounted to "gross incompetence" (Brief 24-28). He first relies on Downum v. United States, 372 U.S. 734 (1963), where the government failed to subpoena a key witness and make no other arrangement to assure his presence. When this witness failed to appear at trial, a mistrial was ordered over the defendant's objection. On retrial the defendant was convicted despite his claim that double jeopardy barred such a retrial. In the instant case, after the government sought unsuccessfully to subpoena Schiaffino, he was arrested as a material witness at the government's request, and on his release from custody, Schiaffino assured the court that he would be available to testify. The government, accordingly, made every effort possible to secure Schiaffino's presence as was not lax in its preparation for trial, as the government had been in Downum. In any event, it was not the incompetence of government counsel which occassioned the result reached in Downum, but rather the fact that the defendant over his objection, was deprived of his "valued right . . . to have his trial completed by the particular tribunal" selected without any countervaling and "very extraoradinary" circumstances to justify that result 372 U.S. at 736.

Appellant's reliance on United States v. Glover, 506 F.2d 291 (2nd Cir. 1974), is similarly misplaced. In Glover, a multi-defendant case, the government requested and granted a severance and mistrial against the defendant Glover after it discovered that Glover's statement (implicating Glover and his co-defendants and the only evidence against Glover) would be inadmissable at the joint trial under United States v. Bruton, 391 U.S. 123 (1968). This Court ruled that double jeopardy principles barred Glover's reprosecution because, at the joint trial, the government had insufficient admissable evidence to convict Glover, and the government should have realized that and should not have allowed Glover to be placed in jeopardy. But, in the instant case the government had no warning before the impaneling of the jury on November 3, 1975, that Schiaffino would be unavailable to testify. The government made every effort to assure Schiaffino's presence and was not negligent, as the government had been in Glover, in preparing for trial. More to the point, however, unless the trial court's finding is set aside as clearly erroneous, the prosecutor's improper statement was not calculated to abort the trial.

jury immediately after the mistrial was granted (App. 92).[17/] On the basis of those factors and its observation of the proceedings, the court concluded that the prosecutor's prejudicial statement, although demonstrating "considerable ineptitude," was not "the product of a purposeful scheme designed to compel a continuance" (App. 140, 170). There is no reason to set aside as clearly erroneous the trial court's considered determination in this regard. Accordingly, since appellant's mistrial motion was necessitated by prosecutorial error which did not amount to calculated manipulation armed at depriving appellant of his right to proceed to verdict, his retrial is not barred by the double jeopardy clause. United States v. Jorn, supra, 400 U.S. at 485.

17/ The government commenced with its opening statement on Thursday, November 6. Since the government did have witnesses available, it was reasonable to anticipate that the government would also have an entire weekend to locate Schiaffino, in the unlikely event the court denied its request for a brief continuance. In fact, Mr. Schiaffino was present in the courtroom on Monday, November 10, (App. 128).

Prior to the impaneling of the jury, the government did learn from Schiaffino's attorney that when Schiaffino took the stand, he might refuse to answer the government's questions (Add. 1-7). But the government properly could believe that, under oath, Schiaffino would testify at trial as he had before the grand jury because "it is one thing to threaten not to testify and quite another to carry out the threat when put to the test." United States v. Graham, 102 F.2d 436, 442 (2nd Cir. 1939), cert. denied 307 U.S. 643.

We emphasize that before the impaneling of the jury there was no indication that Schiaffino would not be present at trial, there only was some indication that he might not respond to the government's questions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the denial of appellant's motion should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Brief for Appellee have this day been mailed to Gino E. Gallina, Joel A. Brenner Attorneys, 30 Broad Street, New York, New York 10004, counsel for Appellant.

Richard R. Romero

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Dated this 4th day of March 1975.

ADDENDUM

01

MR. SHANLEY: May I inquire as to one further thing? What time will we recess today?

THE COURT: He said he has something on this afternoon.

MR. SHANLEY: If it is a personal --

THE COURT: As far as I'm concerned, we don't have to recess until the day is over.

MR. SHANLEY: I would like to know what time Mr. Gallina feels that he has to leave.

MR. GALLINA: I have to be back in my home at 1 o'clock.

THE COURT: We will try.

MR. GALLINA: Your Honor, one further matter which I wish to bring to your Honor's attention. It's my understanding that the Government will not be able to adduce a prima facie case as to Counts Three and Four in the indictment. In fact, they have no evidenc which is legally presentable before this Court.

Now, in view of that, to permit the prosecution to either submit questions vis-a-vis a voir dire which may make reference or relate to these two last counts, or in its opening to cite hearsay evidence as to -- non-legal hearsay evidence -- as to these last two counts would severely prejudice my client's ability to defend himself in the first two counts which are not

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related to the last two counts.

The purpose obviously of the Government in doing that would only be to prejudice the jury and to cause the jury to be so distracted by the story of the last two counts and the surrounding stories in the last two counts that they would not be able to properly distinguish the first two counts which I presume the Government might have some legal evidence on.

In view of that, I would ask at this time that your Honor order that the prosecution make no reference in its opening to the last two counts unless it has legal evidence that it can note as an offer of proof to your Honor. A reading of the indictment to the jury at this time I would ask not include Counts Three and Four. In effect, I am asking your Honor to withhold those two counts from the jury.

I believe that the Government wishes to go ahead in the future on those two counts and it may, it can make a motion at this time to sever the indictment or whatever it wishes to do to protect its position at this time.

THE COURT: Mr. Shanley?

MR. SHANLEY: I would like to inquire of Mr. Gallina how he knows -- what is the basis for his representation?

03

MR. GALLINA: Everytime I make a statement in Court the prosecution wants me to take the stand or reveal my investigatory process. This time I will. It seems that counsel for Mr. Schiffino who is the subject of Counts Three and Four, Joseph Schiffino, came to Court and stated in Court to me, and I know also because I overheard him state it to the prosecutor, that his client was not going totestify in this case and in fact going to refuse to testify in the case and would not testify on the stand.

In addition, that the facts to which he had previously testified had been coerced and forced out of him and they were not true and that is why he is not going to testify in this case.

If the Government does not have him as a witness, the Government is aware of this and unless they are going to deny it we should have a hearing. This is in essence the Government's case and there is no other case.

THE COURT: Mr. Shanley?

MR. SHANLEY: Your Honor, I say this is premature I have been informed, Mr. Gallina is correct, by counsel that the witness's position may well be he refuses to testify. The Government still has the evidence and we intend to put the witness on the stand. We don't know

until he does not testify whether or not he is going to testify or not. If in fact he does refuse to answer questions and he is adjudged in contempt, at that point it would be the proper time to hear any motions along those lines. But to anticipate what a witness is going to do on a mere statement of his counsel does not in any way force the Government into a position to dismiss or sever those counts.

I am willing to take that chance. I want to try this case and I am going to put the witness on the stand. If he wants to go down in a contempt situation, all right. But I am not going to be forced to alter my indictment because of a possibility of a witness refusing to testify.

THE COURT: Mr. Gallina?

MR. GALLINA: It's not a mere possibility. I don't come here and say there is always a possible Government witness who may not testify and the Government should be prevented from opening as to that evidence on that mere possibility, I am stating to your Honor that unusual to most cases the witness came forward and said he will not testify. He is the whole evidence as to those two counts. If the Government opens with that evidence knowing they have no evidence, there will be no way you can separate the prejudice

from the non-prejudice from the jury. If the Government opens by reading the indictment and then the witness refuses to testify, that will have been before the jury and it would be completely prejudicial to my client. I am making a very practical and proper motion to prevent a mistrial in this case.

The only motive Mr. Shanley can have for offering evidence in his opening that he knows that he will not be able to produce is obviously to prejudice the jury and for no other purpose. I would also be remiss if I were to stand up and open and be severely criticized and held for action before the Bar Association if I opened before the jury well knowing that I did not have evidence I alleged before the jury. I ask only for that same consideration from the Government.

THE COURT: Actually you are asking that the Government knowing that this man may not testify -- I don't know that the Government is required to anticipate --

MR. GALLINA: It's very simple. If we are going to take that motion it is very easy for us to clarify the situation and obviate the prejudice. The prosecution could be required to bring his witness here prior to an opening to the jury, be placed on the stand, and have a voir dire to determine whether or

not that evidence is available. If a witness is not going to testify and refuses to testify I don't see how the Government could be allowed to present that evidence to the jury both through the indictment and through the opening.

I ask at this time that we have such a voir dire with the witness brought here and making the determination. It is the only evidence in the two counts.

THE COURT: The Court's instructions would eliminate these counts from the consideration by the jury.

MR. GALLINA: I don't see how that is possible, your Honor. These counts are so prejudicial that if there is no evidence the lingering prejudice from being read to the jury and the fact it was presented to a grand jury and my client has been indicted as to the two counts, the lingering prejudice would undoubtedly poison the minds of this jury right through the trial and through the deliberations.

MR. SHANLEY: If that is the case and if your Honor feels that is the case, if in fact what Mr. Gallina says is going to happen, at an appropriate time Mr. Gallina may move for the disqualification of a juror. The Government should not be put in a position

that it has to divulge its evidence prior to trial on a hearsay allegation by Mr. Gallina that a witness may not testify.

MR. GALLINA: It's not hearsay, the attorney came and told the Court.

THE COURT: That is basically the position you are putting the Government in.

MR. GALLINA: No, the attorney --

MR. SHANLEY: The witness was not here.

MR. GALLINA: The attorney came here with the witness, your Honor.

THE COURT: Mr. Gallina, I intend to give the proper instructions. If at an appropriate time it is necessary that Counts Three and Four be severed or dismissed, whatever may be appropriate, the Court will act accordingly. But I don't think that I can anticipate or I don't think I can require the prosecutor to pretry a portion of this case in order to see whether or not the Government will make out a case.

If the Government doesn't make out a case or this in some way is prejudicial to the extent there should be a mistrial, the Court will have to act accordingly.

The motion or application by the defendant as to Counts Three and Four is denied.